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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 496

NATIONAL LAWYERS GUILD, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (II–R. 113–117) [1] is reported at 126 F. Supp. 730.

[1] The certified record is in two parts. The first part, designated as "I–R.," is the printed joint appendix on petitioner's earlier appeal from the denial of its motion for a preliminary injunction (No. 12,059 below) (I–R. 1–72). This printed joint appendix was incorporated by reference into the joint appendix filed on petitioner's second appeal. The second part, designated as "II–R.," is made up of (a) the printed joint appendix on the second appeal (No. 12,495) (II–R. 1–122), and (b) the record of proceedings in the court below on the second appeal (II–R. 123–141).

The opinion of the United States Court of Appeals for the District of Columbia Circuit (II–R. 123–133) is reported at 225 F. 2d 552. The opinion of the United States Court of Appeals for the District of Columbia Circuit on petitioner's earlier appeal from the denial of its motion for a preliminary injunction is reported at 215 F. 2d 485.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955 (Pet. App. 32; II–R. 134). A petition for rehearing *in banc* (II–R. 135–138), filed on July 29, 1955, was denied on October 4, 1955 (II–R. 139). The petition for a writ of certiorari was filed on October 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether both courts below erred in ruling that petitioner must exhaust its administrative remedy.

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

Pertinent provisions of Executive Order 10450 of April 27, 1953, 18 F. R. 2489, and of Executive Order 9835 of March 21, 1947, 12 F. R. 1935, are set forth in the Appendix, *infra,* pp. 22–26. The Rules of Procedure prescribed by the Attorney General on April 29, 1953, 18 F. R. 2619, with respect to notice, hearing, and designation of organizations under these Orders are set forth in the Appendix, *infra,* pp. 28–33.

STATEMENT

In this action, petitioner, the National Lawyers Guild, seeks to enjoin administrative proceedings initiated by respondent, the Attorney General, under Executive Order 10450—the President's Federal Employee Security Program—to determine whether petitioner is an organization which comes within the purview of that Order. The complaint attacks the Executive Order as a Bill of Attainder and as invalid under the First, Fifth, Ninth and Tenth Amendments. In addition, the complaint asserts that the Rules of Procedure adopted by the Attorney General with respect to notice, hearing and designation of organizations violate due process of law. Petitioner also alleges that the Attorney General is disqualified from continuing the pending administrative hearing because of his alleged prejudgment of the issues. (I–R. 8–12.)

The pertinent facts may be summarized as follows:

1. *The Orders and Rules of Procedure.*—Executive Order 10450, 18 F. R. 2489 (App. *infra*, pp. 22–26), was issued on April 27, 1953, pursuant to authority vested in the President "by the Constitution and statutes of the United States, including sections 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j); and the

act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22–1, *et seq.*)". It revoked and superseded Executive Order 9835, 12 F. R. 1935 (App. *infra*, p. 27), which had established the President's Federal Employees Loyalty Program (see *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123).

Executive Order 10450 established new standards and procedures, based on considerations of security rather than loyalty, governing the employment and retention in employment of persons in the federal service. In conformity with the Act of August 26, 1950 (cited in the preamble of the Order), which permits the summary suspension of federal employees in the interests of national security, Executive Order 10450 prescribes the standard that employment and retention in employment of all government officers and employees be "clearly consistent with the interests of the national security" (Secs. 2, 5, 6, 8; App. *infra*, pp. 23–24).

Like the earlier Loyalty Program, however, one of the factors to be considered in reaching determinations under the Security Program is "[m]embership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, * * * " (Sec. 8 (a) (5) App. *infra*, p. 25). Towards this end, the Department of Justice is directed to continue to

furnish the information described in Part III, Paragraph 3, of Executive Order 9835[2] (App. *infra*, p. 27) directly to the heads of executive departments and agencies (Secs. 12, 13, App. *infra*, pp. 26). Pursuant to this directive, the Attorney General, on April 29, 1953, 18 F. R. 2741, redesignated the organizations previously designated under Executive Order 9835. Concurrently, the Attorney General prescribed Rules of Procedure with respect to notice, hearing, and designation of organizations, 18 F. R. 2619 (App. *infra*, pp. 27–33).

The Rules extend to an organization, which the Attorney General, after appropriate investigation, proposes to designate, the privilege of filing with the Attorney General, within ten days following receipt of notice by registered mail of the proposed action, a statement that it contests the proposed designation. Sec. 41.1 (b) (App. *infra*, pp. 28–29). To insure that notice of the proposed action is received, the Rules provide that if the original notice is not delivered, the Attorney General shall cause the notice to be published

[2] "* * * the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

in the Federal Register, supplemented by such additional notice as he may deem appropriate (*ibid.*). Failure to contest the proposed action may result, after an appropriate determination, in the designation of the organization (*ibid.*).

The Rules prescribe that, within sixty days after a proposed designation is contested, the Attorney General shall furnish the organization in question with a statement of the grounds upon which the contemplated action is based and written interrogatories with respect thereto. Sec. 41.2 (App. *infra*, pp. 29–30). The organization is then given sixty days after receipt thereof within which to reply. Sec. 41.3 (App. *infra*, p. 30). With its reply, the organization may submit supporting affidavits and a request for an administrative hearing. Sec. 41.3, 41.4 (App. *infra*, p. 30). Upon receipt of such a request, the Attorney General is required to set a date and fix a place for the hearing, and to notify the organization thereof by registered mail. Sec. 41.5 (App. *infra*, p. 31).

The hearing required by the Rules is to be conducted informally, and in an orderly and impartial manner, before a board or officer selected by the Attorney General. Sec. 41.7, 41.8 (c) (App. *infra*, p. 31). During the proceedings an organization is entitled: —to be represented by counsel of its own choice (Sec. 41.8 (d), App. *infra*, p. 31); to introduce relevant or material

evidence (Sec. 41.8 (f), App. *infra,* p. 32); to file objections to, and be heard on, the admission or exclusion of evidence (Sec. 41.8 (h), App. *infra,* p. 32); to cross-examine witnesses insofar as consistent with interests of national security (Sec. 41.8 (j), App. *infra,* p. 32); and to inspect or be furnished with, on payment of costs, a transcript of the proceedings (Sec. 41.9, App. *infra,* p. 33). Relevant or material evidence, in summary form where full disclosure would be inimicable to the security of the nation, may also be introduced on behalf of the Attorney General (Sec. 41.8 (b) and (i), App. *infra,* pp. 31, 32).

Within a reasonable time following completion of the hearing, the Attorney General is required to make his final determination on the basis of the entire record, and to notify the organization in question by registered mail. Sec. 41.10 (App. *infra,* p. 33). Any handicap imposed upon an organization by virtue of the non-disclosure of classified security information or the identity of confidential informants is to be taken into consideration by the Attorney General in making his final determination (*ibid.*).

2. *Administrative actions prior to suit.*—On August 27, 1953, the Attorney General, by registered letter, served notice upon petitioner that he proposed to designate it "as coming within the purview of Executive Order No. 10450 in accordance with the rules promulgated thereunder".

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A copy of the Rules was attached to the notice. (I–R. 68).

On August 27, 1953, and subsequently on September 5, 1953, the Attorney General announced in speeches delivered to the American Bar Association and to the American Veterans of World War II that he had served notice upon petitioner that he proposed to designate it as coming within the purview of the Order. In these speeches, the Attorney General also made public the nature of certain of the charges upon which the proposal to designate was based (II–R. 8–20 and 21–31).

On September 16, 1953, petitioner filed a notice of contest, having obtained an extension of time to September 17, 1953 (I–R. 15–20). On or about November 17, 1953, in accordance with Section 41.2 of the Rules of Procedure (App. *infra*, pp. 29–30), petitioner was served with a statement of the grounds upon which the proposal to designate was based (I–R. 23–25). Accompanying the statement of grounds, in accordance with Section 41.2 of the Rules, were sixty-six interrogatories with respect thereto (I–R. 44–64).

In pertinent part, the statement of grounds asserted that petitioner was "proposed and initiated under the direction and supervision of the Communist Party", and that petitioner "has been utilized by the Communist Party and Communist Party members to indoctrinate members of the legal profession for the purpose of securing support for and sympathy with the policies, objec-

tives, and programs of the Communist Party and to serve as a legal arm of the Communist Party" (I–R. 24). It was further charged that, from 1946 to date, petitioner has substantially followed, supported and paralleled the policies and programs of the Communist Party and the foreign policy of the Soviet Union; opposed the policy of the United States when in conflict with that of the Soviet Union; and has been dominated in its activities by acknowledged leaders, officials and members of the Communist Party and persons with a substantial record of membership in, or activities on behalf of, organizations designated in the past by the Attorney General (I–R. 24).

3. *Proceedings relating to petitioner's motion for a preliminary injunction (No. 12,059 below).*— Petitioner began this litigation in the District Court for the District of Columbia on November 30, 1953 (I–R. 1). On December 4, 1953, petitioner moved for a preliminary injunction (I–R. 25–26). In support of its motion, petitioner submitted affidavits stating that the Attorney General's proposed designation of petitioner would cause petitioner irreparable injury for which it had no adequate remedy at law, including damages to its reputation and prestige, interference with public acceptance of its publications, programs and recommendations, loss of present and prospective members, and loss of membership dues and public donations (I–R. 12, 26–29, 64–67). In addition, petitioner claimed that its members would be sub-

jected to various governmental sanctions should it be designated by the Attorney General (I–R. 6). It was further claimed that answering the interrogatories "would be extremely onerous, and burdensome, and as to some of the questions, impossible or virtually so," and that this "would entail a huge expense and effort in research, investigation, analysis, and compilation" (I–R. 27). But see *infra,* p. 13.

On December 30, 1953, before the filing of any responsive pleading to petitioner's complaint, Judge Keech denied petitioner's motion for a preliminary injunction (I–R. 71–72). He found that petitioner "has failed to demonstrate that it is suffering such irreparable harm as to justify judicial interference at this time" and that "[t]he injury that a preliminary injunction would do to the Government outweighs any injury [petitioner] would allegedly incur" (I–R. 71).

Concurrently, petitioner was also pursuing its administrative remedy. Earlier, on December 23, 1953, it had requested an extension of time to April 1, 1954, within which to answer the statement of grounds and the interrogatories (II–R. 31). In response to this request, the Attorney General, on December 30, 1953, granted petitioner an extension of time to March 1, 1954, within which to answer the interrogatories and an extension of time to February 1, 1954, within which to request modification of the interrogatories (II–R. 32–33). On March 19, 1954 (II–R. 34),

pursuant to petitioner's timely application (II–R. 35–42), the Attorney General served petitioner with sixty-four amended interrogatories (II–R. 44–65) in place of the sixty-six originally served. Petitioner's answer thereto was due thirty days thereafter (II–R. 43). On April 15, 1954, in answer to petitioner's request that its time be extended to thirty days after action by the Court of Appeals on its motion for a stay (II–R. 66), the Attorney General granted petitioner an extension to May 5, 1954, within which to reply to the amended interrogatories (II–R. 67–68).

On May 4, 1954, the Court of Appeals (Circuit Judges Prettyman and Miller, and District Judge McGuire) entered an order reversing and remanding the cause. The Court of Appeals stated "that the interests of justice would be served best in this matter if the administrative hearing were held in abeyance pending the judgment of the District Court upon the merits of the issues posed in the action." *National Lawyers Guild* v. *Brownell,* 215 F. 2d 485. However, in granting this limited stay, the Court of Appeals expressly declined to grant petitioner's "motion * * * for a preliminary injunction of the usual scope, effective until the ultimate disposition of the case, including appeals * * * [because] we think such an extensive stay is not justified at the present stage of the proceedings." (*ibid.*).

4. *Proceedings relating to respondent's motion for judgment* (*No. 12,495 below*).—On remand,

after filing a supplemental answer (II–R. 34–35),[3] respondent moved for judgment on the pleadings or, in the alternative, for summary judgment (II–R. 69). In support of the motion for summary judgment, respondent, as Attorney General of the United States, filed an affidavit denying petitioner's charge of prejudgment (II–R. 109–112). Respondent stated in the affidavit that the only determination made by him thus far is the preliminary determination that the evidence warrants the proposal to designate petitioner, *i. e.,* an initial *ex parte* determination that a *prima facie* case exists (II–R. 111–112). In addition, respondent reaffirmed his intention to make an impartial final determination at the completion of the pending administrative proceedings (II–R. 112).

On November 4, 1954, Judge McLaughlin filed a memorandum opinion, granting respondent's motion for summary judgment (II–R. 113–117). Judge McLaughlin held that the mandate of the Court of Appeals had left for the District Court's consideration the question of the applicability of the doctrine of exhaustion of administrative remedies (II–R. 121). He found that the pleadings, exhibits and affidavits on file show that there

[3] Respondent had filed his answer to the complaint on January 29, 1954 (II–R. 2–8), after petitioner had taken an appeal to the Court of Appeals from the District Court's order of December 30, 1953, denying a preliminary injunction.

is no genuine issue as to any material fact, and, in particular, that the claim of prejudgment relied upon by petitioner does not present such an issue (II–R. 121). Judge McLaughlin concluded that respondent's public statements would not prevent him from rendering an impartial decision on the question whether or not petitioner should be designated (II–R. 121), and that, since petitioner has failed to exhaust its administrative remedy, petitioner is not entitled to judicial relief of the character here sought (II–R. 122).

On November 23, 1954, Judge McLaughlin entered summary judgment for respondent (II–R. 122), and denied petitioner's motion for a stay pending appeal. With respondent's consent, the trial judge stayed the administrative proceedings to December 9, 1954, in order to permit petitioner to apply to the Court of Appeals for a stay pending appeal. On December 9, 1954, respondent advised the Court of Appeals that he would voluntarily hold the administrative proceedings in abeyance pending disposition of petitioner's motion for a stay, and that if the motion were denied, petitioner would be granted an additional three days in which to file its reply to the amended interrogatories. In this connection, petitioner orally advised the Court of Appeals that its reply to the amended interrogatories had already been prepared. See *supra*, p. 10.

On December 23, 1954, the Court of Appeals (Stephens, Danaher and Bastian, JJ.) denied petitioner's motion for a stay pending appeal. On December 27, 1954, petitioner applied to the Chief Justice of the United States for a stay pending appeal.[4] Again, respondent voluntarily agreed to hold the administrative proceedings in abeyance pending disposition of the application. No action was ever taken on the application by the Chief Justice.

On July 14, 1955, the Court of Appeals (Prettyman, Miller and Danaher, JJ.) affirmed the District Court's ruling that petitioner must exhaust its administrative remedy (Pet. App. 32; II–R. 134). That court held that the doctrine of exhaustion of administrative remedies was not negatived by a claim of constitutional invalidity; that, since the Attorney General's Rules of Procedure permit a proceeding which complies with due process, the court cannot speculate at this time as to the nature of the proceeding which may occur; that, with respect to alleged prejudgment, petitioner must await developments at the administrative hearings; and that petitioner's claim of irreparable injury is insufficient to excuse exhaustion (Pet. App. 21–31; II–R. 123–133). A petition for rehearing *in banc* (II–R. 135–138) was denied on October 4, 1955 (II–R. 139).

[4] With neither of these requests for stays did petitioner submit new affidavits which might have substantiated the predictions of irreparable injury made a year earlier when suit was brought.

Although petitioner had prepared its reply to the amended interrogatories by December 1954 (see *supra*, p. 13), petitioner had not filed that reply under the terms of respondent's agreement of December 1954 to postpone further administrative action until the Chief Justice acted upon petitioner's application for a stay pending appeal. Since that application is now moot, respondent has agreed that petitioner's reply may again be held in abeyance pending disposition of the petition for a writ of certiorari.

ARGUMENT

Petitioner asks this Court to hold that the Attorney General may not constitutionally designate an organization as communist under the federal employee security program. Petitioner asserts (a) that no such power may constitutionally exist, and (b) that, if it does, there are restrictions on the method of its exercise which have allegedly been violated (Pet. 13). As we read *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123,[5] in the light of, and

[5] The identical contentions were advanced by the organizations involved in the *Joint Anti-Fascist Refugee Committee* case. See Brief for Petitioner, No. 8, O. T. 1950, p. 48. Only one of the majority justices agreed that the listings were invalid for total lack of power in the President and the Attorney General (341 U. S. at 142, 143); three other members of the majority implicity rejected

together with, *Adler* v. *Board of Education*, 342 U. S. 485, this Court has already declared that the power does exist where listings are made after notice and hearing. Assuming, however, that this question is still open, it is prematurely raised here since petitioner has not been designated and has not exhausted its administrative remedy.

1. Petitioner contends that the exhaustion doctrine is inapplicable where the constitutional power to act is itself challenged (Pet. 13). This Court has held to the contrary in several cases. *E. g., Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752.

Petitioner attempts to distinguish such cases on the ground that no Act of Congress is here involved (Pet. 15–16).[6] However, judicial deference to a statutory scheme is not the sole reason for the exhaustion rule. It also rests upon the important consideration that the exhaustion of an administrative remedy may obviate the need for

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this basic contention by accepting the secondary contention that the designations were invalid for want of notice and hearing (341 U. S. at 149, 174, 183); the three dissenting justices flatly rejected the basic contention (341 U. S. at 187).

[6] As noted in the Statement, (*supra*, pp. 3–4), Executive Order 10450 expressly rests upon the authority vested in the President by several statutes. In saying that no statute is here involved, petitioner presumably means that no statute expressly directs the Attorney General to compile the list of organizations in issue.

any judicial determination or render precise the scope of decision necessary. Cf. *Aircraft & Diesel Corp.* v. *Hirsch, supra,* at 772–773. Thus, this Court has required exhaustion of administrative remedies despite the absence of a statutory scheme for administrative proceedings followed by judicial review. *E. g.*, where the statute provided for finality of the administrative determination (*Aircraft & Diesel Corp.* v. *Hirsch, supra*); where the administrative proceeding was prescribed by regulation rather than statute and no provision was made for judicial review (*Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868; *Fahey* v. *Mallonee*, 332 U. S. 245); where neither the statute nor the regulation prescribed an administrative hearing and no provision was made for judicial review (*Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117); and where, although the statute did provide for judicial review, neither the statute nor the agency had provided for administrative hearings (*Bourjois, Inc.* v. *Chapman*, 301 U. S. 183).

2. Petitioner argues that this action is not untimely because the administrative procedures are "grossly inadequate" and "a caricature of due process" (Pet. 14). Conceivably, the Attorney General's Rules of Procedure would permit a proceeding which would vary in several respects from provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.* But

even assuming that that Act applied and that its safeguards fix the minimum requirements of due process,' it is equally true, as the court below specifically pointed out (Pet. App. 29), that the Rules "also permit a proceeding which would comply in all respects with that Act". In the circumstances, the court below was clearly justified in refusing to speculate as to the nature of the proceeding which may occur.[8] As this Court has wisely cautioned, "[w]e cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee*, 332 U. S. 245, 256; cf. *Yakus* v. *United*

[7] But cf. *Marcello* v. *Bonds*, 349 U. S. 302.

[8] Cf. also *Parker* v. *Lester*, decided October 26, 1955, by the Court of Appeals for the Ninth Circuit, in which the court stated (slip opinion p. 10, fn. 11a):

"This distinction [between regulations thought to be incapable of affording a fair hearing and those which do permit such a hearing] is pointed up by a comparison of the regulations adopted in conformity with the decree below, and the regulations considered in National Lawyers Guild v. Brownell, (D. C. cir), —— F. 2d —— (decided July 14, 1955). In that case the court pointed out that the Attorney General's rules of procedure there considered 'permit a proceeding which would comply in all respects with that [Administrative Procedure] Act. On this point, as on the prior one, it is enough for us to say we cannot now speculate as to the nature of the proceeding which may occur. . . .' Here, on the contrary, the Coast Guard regulations expressly recite (note 5, supra): 'This statement shall not be worded with such particularity as to disclose the sources of such information or data, nor the identity of any person or persons who may have furnished such information or data, to said person or other persons.'"

States, 321 U. S. 414; *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183.

3. Petitioner's charge that the Attorney General is guilty of prejudgment (Pet. 14) is another facet of its argument that the administrative remedy is illusory. Similar claims of prejudgment have been rejected by this Court as a matter of law. Cf. *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 700–701; *National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U. S. 219, 236–237; *Fahey* v. *Mallonee,* 332 U. S. 245; *United States* v. *Morgan,* 313 U. S. 409, 420–421. In any event, the charge of prejudgment is also premature. Cf. *Marcello* v. *Bonds,* 349 U. S. 302; *Shaughnessy* v. *Accardi,* 349 U. S. 280; *Federal Trade Comm'n* v. *Cement Institute, supra.* Implicit in these cases is the principle that decision upon alleged prejudgment must await exhaustion of the administrative remedy. As the Court stated in *Yakus* v. *United States,* 321 U. S. at 434, "[i]n the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by 'loading the record against them' or denying such hearing as the Constitution prescribes."

4. Finally, petitioner argues that it will be irreparably injured by continuation of the administrative process. However, the injuries of which

it complains—the expense of the proceeding and the alleged damage to its reputation with resulting loss of membership, contributions and public acceptance—are common to any litigation, are not peculiar to administrative proceedings, and hence are "part of the social burden of living under government." *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. at 540.[9] Petitioner asserts that it is entitled to special consideration because it is a bar association. But one would suppose to the contrary that the maxim "equal justice under law" was particularly applicable to a bar association. Cf. *Associated Press* v. *United States*, 326 U. S. 1, 6–7.

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[9] The interrogatories of which petitioner complains are, as the court below specifically noted, subject to further administrative modification and revision. As that court stated (Pet. 31):

"* * * the proper place to test these interrogatories in the first instance is before the administrative body. We cannot anticipate the administrative action, if such a step were taken, any more than we can anticipate the outcome of the proceeding itself. Some modifications have already been made, and we cannot now say that others will not be made if specific application is made."

Furthermore, the filing of an answer to the interrogatories would not preclude subsequent judicial review and relief in the event that petitioner is ultimately designated at the conclusion of the administrative proceedings. For example, the interrogatories and the reply thereto might be stricken from the administrative record.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1955.

APPENDIX

Executive Orders and Regulations Involved

A. *Pertinent provisions of Executive Order 10450 of April 27, 1953, 18 F. R. 2489, 3 C. F. R. (1953 Supp.)*

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

Whereas the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

Whereas the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

Now, therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of

August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22–1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

* * * * *

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * * * *

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of

the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

* * * * *

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under

the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

* * * * *

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency. [Section 11 is not here pertinent.]

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

* * * * *

SEC. 15. This order shall become effective thirty days after the date hereof.

B. *Provisions of Paragraph 3 of Part III of Executive Order 9835 of March 21, 1947, 12 F. R. 1935, 1938, 3 C. F. R. (1947 Supp.)*

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

C. *Provisions of The Attorney General's Rules of Procedure for the Federal Employee Security Program—Department of Justice Regulations of April 29, 1953, 18 F. R. 2619, 28 C. F. R. (1955 Supp.), Part 41*

DESIGNATION OF ORGANIZATIONS IN CONNECTION WITH THE FEDERAL EMPLOYEE SECURITY PROGRAM

By virtue of the authority vested in the Attorney General by section 22 of Title 5 of the United States Code, and by Executive Order No. 9835 of March 21, 1947, and Executive Order No. 10450 of April 27, 1953, I hereby prescribe the following rules of procedure with respect to notice, hearing,

and designation of organizations in connection with the Federal employee security program:

Sec.

41.1 Notice to and by organizations
41.2 Statement and interrogatories by Attorney General
41.3 Reply by organization
41.4 Request for hearing
41.5 Notice of hearing
41.6 Default
41.7 Hearing board or officer
41.8 Hearing
41.9 Recording of testimony
41.10 Determination
41.11 Previous designations not affected

AUTHORITY: §§ 41.1 to 41.11 issued under R. S. 161; 5 U. S. C. 22, E. O. 9835, Mar. 21, 1947, 12 F. R. 1935; 3 CFR, 1947 Supp.; E. O. 10450, Apr. 27, 1953, [18] F. R. 2489 [3 CFR, 1953 Supp.].

§ 41.1 *Notice to and by organizations.* (a) Within ten days after the effective date of Executive Order No. 10450 of April 27, 1953, each organization which has been designated by the Attorney General pursuant to Paragraph 3 of Part III of Executive Order No. 9835 of March 21, 1947, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it contests such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such designation.

(b) Whenever the Attorney General after appropriate investigation proposes to designate an organization pursuant to Executive Order No. 9835 or Executive Order No. 10450, or both, notice of such proposed designation shall be sent by reg-

istered mail to such organization at its last known address. If the registered notice is delivered, the organization, within ten days following its receipt or ten days following the effective date of Executive Order No. 10450, whichever shall be later, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. If the notice of proposed designation is not delivered and is returned by the Post Office Department, the Attorney General shall cause such notice to be published in the FEDERAL REGISTER, supplemented by such additional notice as the Attorney General may deem appropriate. Within thirty days following such publication in the FEDERAL REGISTER, such organization may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such proposed action, and the Attorney General may thereupon after appropriate determination designate such organization and publish such designation in the FEDERAL REGISTER.

(c) The notice of contest provided in this part shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of the organization which desires to contest such designation or proposed designation.

§ 41.2 *Statement and interrogatories by Attorney General.* Within sixty days following receipt of a notice of contest, the Attorney General shall cause to be forwarded to the organization by registered mail a statement of the grounds upon

which the designation was or is proposed to be made and written interrogatories with respect thereto. In the case of organizations designated pursuant to Paragraph 3, Part III of Executive Order No. 9835, such statement may include information obtained since the designation.

§ 41.3 *Reply by organization.* The organization, within sixty days following receipt of such statement and interrogatories, may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.

§ 41.4 *Request for hearing.* Any organization filing a reply as provided in this part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

§ 41.5 *Notice of hearing.* Upon receipt of a request as provided in § 41.4, the Attorney General will set a date and fix a place for hearing and notify the organization thereof by registered mail.

§ 41.6 *Default.* When an organization declines or fails to appear at any scheduled hearing, the Attorney General shall without further proceedings determine the matter on the basis of the information available to him and the reply of the organization.

§ 41.7 *Hearing board or officer.* For the purpose of conducting any hearing as provided in this part the Attorney General shall assign such officer or board as he shall deem necessary.

§ 41.8. *Hearing.* (a) If upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this part it appears to the board or hearing officer that a determination may appropriately be made without the taking of evidence, the proceeding may be conducted without the taking of such evidence.

(b) The Attorney General, at his election, may rely upon the statement of grounds upon which the designation was or is proposed to be made, or may introduce evidence in support thereof or supplemental thereto, or in rebuttal of any evidence received on behalf of the organization.

(c) Hearings before a board or officer shall be informal and shall be conducted in an orderly and impartial manner.

(d) An organization shall be entitled to appear by counsel or other representative of its own choice.

(e) Testimony shall be given under oath or affirmation.

(f) The ordinary rules of evidence need not be adhered to at the hearings but reasonable bounds shall be maintained as to relevancy, competency and materiality. Both the Attorney General and the organization may introduce such evidence as the board or officer may deem proper in the particular case. In the discretion of the board or officer, the affidavit of any witness may be received in lieu of his oral testimony.

(g) Whenever, in the judgment of the board or officer, the proposed testimony of any witness appears to be irrelevant, immaterial, cumulative, or repetitious, the board or officer may refuse to receive such testimony.

(h) All objections to the admission or exclusion of evidence or other rulings of the board or officer shall be limited to a concise statement of the reasons therefor and shall be made part of the record. Argument upon such objections may be limited in the discretion of the board or officer.

(i) The board or officer shall be authorized to receive as evidence on behalf of the Attorney General information or documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants.

(j) Witnesses testifying before the officer or board shall be subject to cross-examination, provided that no witness on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants.

(k) If in the course of a hearing any witness or other participant is guilty of misbehavior which obstructs the hearing, such person may be excluded from further participation in the hearing.

§ 41.9 *Recording of testimony.* The testimony and proceedings at the hearing shall be recorded and transcribed by a person or persons designated by the Attorney General and made a part of the record. The organization, by its counsel or authorized representative, shall be entitled to inspect the transcript, and, upon request and at its cost, shall be furnished a copy thereof.

§ 41.10 *Determination.* Within a reasonable time following completion of any proceeding hereunder, the Attorney General shall make a determination on the record which shall include the statement of the grounds, interrogatories, replies to the interrogatories, affidavits, and testimony elicited at the hearing and other documents and papers filed in the proceeding, and shall notify the organization of the determination by registered mail. In making his determination the Attorney General shall take into consideration any handicap imposed upon an organization by the non-disclosures to it of classified security information or the identity of confidential informants and by reason of the lack of opportunity to cross-examine confidential informants.

§ 41.11 *Previous designations not affected.* The promulgation of the rules of procedure contained in this part shall not be deemed a revocation of any designation made by the Attorney General pursuant to Paragraph 3, Part III of Executive Order No. 9835, but each such designation shall continue in effect unless the administrative process herein provided is invoked by the organization affected and upon completion thereof a contrary determination is made by the Attorney General as to such organization.

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